United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original

Docket #74-8234

74-2702

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

PATRICK HENRY VALCARCEL,

Defendant-Appellant.

----------x

APPELLANT'S BRIEF

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CITATION OF CASES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

PATRICK HENRY VALCARCEL,

Defendant-Appellant.

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STATEMENT AND FACTS

The defendant was indicted in the United States District Court for the Eastern District of New York under indictment number 74 CR 204 on three counts of bank robbery arising from a single alleged incident at Bankers Trust of Suffolk at or about 2:00 p.m. on February 25, 1974, to wit, count 1: 18 U.S.C. Section 2113(d) by placing lives of persons in jeopardy, count 2: 18 U.S.C. Section 2113(a) by force and violence and intimidation, and count 3, 18 U.S.C. Section 2113(b) by larceny. (512)

Trial was held before Chief Judge Jacob Mishler and a jury on April 23, 24, 25 and 26, 1974. On April 26, 1974 the jury returned a verdict of not guilty of count 1. (614) The jury returned a verdict of guilty of count 2 (614). The jury, following instructions of the trial court, did not render a verdict on count 3(512, 614). On June 25, 1974 the defendant was sentenced to a term of 15 years in jail by Chief Judge

Jacob Mishler; the judgment of conviction was duly entered June 25, 1974 and a notice of appeal was duly filed by the Clerk of that trial court that day (Transcript, June 25, 1974, pp. 13-15, 17).

This appeal is taken on the original record pursuant to an order of Chief Judge Jacob Mishler granting in forma pauperis relief to the defendant and pursuant to the order of this Court dated December 16, 1974 appointing Charles Sutton, Esq. as counsel for defendant-appellant, Patrick Henry Valcarcel pursuant to the Criminal Justice Act and allowing and ordering the filing of seven (7) xerox copies of the appellant's brief.

The defendant stipulated at the trial that the bank at issue was insured by the Federal Deposit Insurance Corporation (166, 522) that he had exclusive possession on March 4, 1974 of 25 Twenty ($20) Dollar bills amounting to $50.00 which were pre-recorded bank "bait money". (18,19; 571,574)

The defendant did not stipulate that the bait money had been stolen from the bank on February 25, 1974 (or any other date). The defendant did not stipulate that he stole the bait money from the bank.

The defense was that the defendant <u>was given</u> the bait money by a teller at the bank on the morning of February 25, 1974 as the cash exchange for three checks totalling $865.00 (270).

Evidence with respect to the existence and absence of

the bait money was given by government witness Angela Crimi, a teller at the bank. Her testimony was that the bait money was delivered to her on April 19, 1973, that it was checked three times per year, that the last time it was checked was December 19, 1973 (45), some two months prior to February 25, 1973. There was no testimony by Angela Crimi that she had looked at, or seen, or checked the bait money at any time after December 19, 1973.

Angela Crimi, on the other hand, testified that the bait money was'given out' on February 25, 1974.(40,41) She did not testify that the bait money was stolen.

The issues on this appeal concern in the main the charge of the trial court which the defendant contends was plain error, precluded the jury from consideration of his defense, deprived him of the process of law, and effectively directed a verdict; the charge equated the possession by the defendant of the $500.00 bait money as sufficient for the jury to infer that the defendant was the bank robber; the defense that he had been given that money by the bank teller in an ordinary bonafide banking transaction on the morning of February 25, 1974 was wiped away by the charge.

The effect and importance of the charge on the two issues which were before the trial jury, namely (1) was the bait money stolen in the bank theft or was it given to the defendant in the ordinary bank transaction which the documentary evidence

and the testimony of witness established had occurred on the morning of the bank robbery and (2) was the defendant the bank robber, was all the more devastating and destructive of a fair trial and due process because none of the eyewitnesses to the robbery identified the defendant as the bank robber, and one witness who knew the defendant and worked with him and was in the bank at the time of the bank robbery testified that the defendant was not the bank robber (219,213,214) the eyewitnesses to the bank robbery were Richard Cocchiardo co-worker with the defendant in a rug shop near the bank (207-8), Angela Crimi, a bank teller, Deborah Brown, a bank teller, and Denise M. Upham (maiden name Phillips at the time), a bank employee (33).

Angela Crimi, variously described the scarf worn by the bank robber as "very muted green and brown scarf" (31), "looked like a plaid scarf" (47) was a "black scarf" (69). Deborah Brown described the scarf as "dark green with prints in it, was rectangular shaped" (81). Denise M. Upham described the scarf as "green plaid" (99) and as a "green plaid woolen scarf" (117) a "green woolen scarf around the neck" (125). /Government Exhibit 19 which was seized from the living quarters of defendant by the government (as the product of an unlawful search, it will be contended) was an army camouflage design cotton type material as the physical evidence itself will show by observation./

Angela Crimi described the gloves worn by the bank robber as "gloves" (31). Deborah Brown described the gloves as "dark gloves" (81). Denise M. Upham described the gloves

as "black leather gloves" (102). It is notable that the gloves seized from the living quarters of defendant (146-148) and introduced as Government Exhibit 27, had inserts (89, 90); none of the witnesses at any time described the gloves of the bank robber as having any inserts.

Angela Crimi described the coat worn by the robber as "just a normal black man's raincoat which was buttoned" (31) and as a "black raincoat" (69). Deborah Brown described the coat as "a black type raincoat, knee length" (80) and "a dark, black raincoat type trench coat, seemingly knee length" (88) and that it had 'no distinguishing feature differentiating it from any other black coat' (90). Denise M. Upham described the coat worn by the robber as "charcoal gray (115, 116) and as an "overcoat" (98) and as an "old coat. . . very dark gray or black" (99). Government Exhibit 12 , the coat which was seized from the garage of the home of Carol M. Klein, without a search warrant, and, it is contended, without lawful authority (139, 150, 151), was a black raincoat with fur lining (45). None of the witnesses testified that they had observed the coat to have any fur lining.

Mrs. Upham testified that during the course of the bank robbery, the robber's mask"slipped" and she "observed" a part of a moustache and long sideburns (100). On cross-examination she testified that she gave such information to the officer questioning her (121, 122), and later testified that she did not give such information (125, 126). She testified the officer did not ask (126). The officer, Special Agent, McMullen, was asked on cross-examination if Mrs. Upham had given him information that

the robber had a mustache and long sideburns and he testified that she did not (141-142). He testified that he asked her about any distinguishing features of the robber, which he stated included mustaches, and that she had not told him of any; he testified that he may have used the word mustache in questioning her (142); he testified that he did ask her for the robber's description (143), and that she did not refer to any mustache (144), and that if she had, he would have put that in his report (144) and that if she had told him that she had seen the robber's mask slip, he would have put that in also (144, 145).

Witness Richard Cocciardo testified directly that the robber was not the defendant, Valcarcel (219, 213,214), without any doubt on his part (219). He testified that he had worked with defendant Valcarcel for six or seven weeks (207, 208) and that he was in the bank when it was robbed (208). Cocciardo described the robber as being six feet four or six feet five inches tall (213, 214). Denise M. Upham described the bank robber as being "six foot four" inches tall (120) (175). Defendant, Valcarcel is about five feet ten (5' 10") tall .

Defendant, Valcarcel testified that prior to February 25, 1974 he had been in the bank "at least a dozen times for various things... I cashed my weekly check with them" (269). He testified that on February 25, 1974 he had cashed three checks totalling approximately $865.00 (270) in the morning (274, 275). Two checks, defendant's exhibits A and B, respectively for $330.00 and for $335.00 were introduced in evidence (52, 270). The third

check was not produced because of failure of the maker to produce the check, even though subpoenaed (302-308). (452-458) The defendant testified that in the course of cashing the checks, the teller performing that service for him had a conversation with the teller next to her, whom he identified at the trial as Miss Crimi (277) and that his teller "gave her a stack of what I assumed to be money" (277) (278) and that Miss Crimi in return "gave her a stack of bills back" (278). The defendant testified that he was given cash in demoninations of "five, tens, twenties" (278) which he kept (278). He testified that the money as received by him did not have any wrappings around it (290). As noted above, teller Angela Crimi testified that the bait money was "given out" on February 25, 1974.

He testified he then returned to the store where he worked "shortly before twelve" (279) (209). Witness Richard Cocciardo testified that on February 25, 1974 the defendant returned to the store "about twelve" (208, 209).

POINT I

The trial court charges deprived defendant of his defense, of a fair trial and of due process of law.

As stated above, the defendant had stipulated that the bank was a federally insured institution and there had occurred at that bank a theft of $4,066.00 on February 25, 1974 at or about 2 p.m. and that he had exclusive possession of $500.00 in 25 twenty dollar bills, which the government contended was pre-recorded "bait money" The defendant did not stipulate that the "bait money" had been stolen or that the defendant was the thief. Those were the two issues in this trial: (1) Was the bait money stolen in the bank theft or was it given to the defendant in a regular banking transaction at the bank on the morning of February 25, 1974 as he alleged in defense, and (2) was the defendant the bank thief or bank robber.

The trial court with these issues before it, charged the jury and made statements to the jury even prior to the formal charge to the jury instructing the jury that they could find that the defendant was the bank robber from the fact-which defendant had stipulated to - of his possession of the "bait money". On this trial, the defendant was convicted by reason of the trial court's statements and charges that the jury may infer two facts from his stipulated possession of bait money, namely (1) that the bait money was stolen and (2) that the defendant stole it at the bank on February 25, 1974 at or about 2 p.m.

It is respectfully submitted that the charge was plain error, deprived the defendant of a fair trial and of due process of law.

Barnes v. United States,
412 U.S. 837 (1973).

It is respectfully submitted that charging the inference in this was arbitrary because there was no legal evidence that the bait money was in the cash drawer of teller, Angela Crimi at the bank on February 25, 1974 at or about 2 p.m. (Supra, p.2,3)

Barnes v. United States,
412 U.S. 837, 842 (1973)

At the beginning of the charge the trial court clearly charged the jury that the bait money was "stolen property" and more, that it was "recently stolen property". (502, 503) to wit:

> "An inference is a discretionary matter based on good common sense and experience. It's a conclusion which the jury may draw from established facts.
>
> Now, the example is -- the inference that the jury may draw in proving a matter through circumstantial evidence, makes it -- I will later charge you on an inference which you may draw from possession of recently stolen property, which in this case, was the bait money, and the other, an inference which you may draw from exculpatory statements proven to be false." (Underscoring added).

From that point on the trial ended. The jury was repeatedly charged so that only one verdict was possible: That the defendant was guilty.

That charge removed from the consideration of the jury the two essential issues which the jury was required to decide upon legal evidence beyond a reasonable doubt, since upon the premise that the bait money was recently stolen money, the trial court instructed the jury that it may infer that the defendant was the bank robber.

The government thereby was relieved of its duty to establish by proof beyond a reasonable doubt that the bait money in the possession of the defendant was stolen from the bank on February 25, 1974 at about 2 p.m. and that the defendant stole it.

The repeated charge to the jury which denied the defendant a fair trial and due process began at least as early as the summation by the government attorney (477-478). There the government attorney stated that on the evidence of the possession of the bait money by the defendant that the jury can be convinced of the guilt of the defendant - - " (478). The trial court, instead of removing that error from the minds of the jury, compounded it by its statements:

> "The Court: I do not believe that. It is on the whole record that they may draw that whole inference.
>
> If, in addition to that, based on the whole record and the inferences to be drawn, the jury may draw from the possession of the bait money, that the Government has proved its case beyond a doubt, then they may find the defendant guilty." (478).

The trial judge did not explain the meaning of the words "it is on the whole record that they may draw the whole inference" (478). It is fair to state that the lay jury would simply understand that the trial court was telling them that on that record - the whole record - and the fact that the defendant had stipulated that he had exclusive possession of the bait money - that the jury could find that the Government had proved its case beyond a reasonable doubt. This charge took no account of the defense. In fact, it displaced and precluded consideration of the defense by the jury.

The error was continued and emphasized again and again by the trial court's charge that the jury could infer that the defendant was the bank robber from the fact of his recent possession of the bait money:

> (at p. 522:) "The defendant concedes that on March 4, 1974 he had sole and exclusive possession of 25 $20 bills that were pre-recorded by the bank and described as bait money.
>
> Now, if you find that the Government has proved beyond a reasonable doubt that the 25 $20 pre-recorded bills were stolen during the robbery, and if you find that the Government has proved beyond a reasonable doubt - and I say that was stipulated that the defendant had sole and exclusive possession of the 25 $20 pre-recorded bills - then you are permitted to infer from the defendant's unexplained or unsatisfactorily explained possession - - -
>
> . . .
>
> (p. 523) If you find that these bills, the bait money was stolen at the time of the robbery and the defendant having conceded sole and exclusive possession of that money on the 4th day of March, 1974, about one week after the robbery, then you

> may infer, if you find the possession is not satisfactorily explained, you may then infer that the defendant is guilty of robbing the bank on February 25, 1974, if in your judgment, such an inference is warranted by the evidence as a whole.
>
> Now, in making this inference from possession of recently stolen money, you may not infer that the defendant placed lives in jeopardy. You may only infer that he robbed the bank. That does not include the other inference. Other evidence in the case would be necessary to support the elements in the graver crime, which again, I point out is only found in count 1.
>
> The defendant's possession of recently stolen property does not shift the burden of proof. The Government must still prove its case beyond a reasonable doubt. The burden is also on the Government to prove, beyond a reasonable doubt every essential element of the offense charged before the defendant may be found guilty of that offense." (524).

The trial court's charge that the inference would prove counts 2 and 3 but not count 1, which included the element of placing lives in jeopardy served to emphasize again the controlling effect of the inference from the possession by the defendant of the bait money. The trial court's charge repeatedly assumed as a fact, and so stated it, that the defendant's possession of bait money, which the defendant had stipulated and testified to was "recently stolen property" (523)7

The trial court's charge that if the government has proved a robbery - which the defendant stipulated:

> "then the defendant's unexplained or unsatisfactory explanation of the possession of bait money and the other evidence in the case permits you to infer that thedefendant was the robber" (524-525),

repeated the prior errors and suffocated the defense.

That charge confused by its language and the jury diverted its attention to the government's claims that the defendant had made a post-arrest statement that he received the bait money from Richard Cocciardo /the defendant denied making any such statement(294-5)/ and away from the defendant's trial defense that the bank gave him the bait money in a transaction on the morning of February 25, 1974, (which the bank records confirmed).

The trial court tilted the scales of a fair trial thereby.

It did not present to the jury in its charge a fair view of the defense or indeed any view of the defense. The entire defense was put into a small corner of the government's case and as part of the burden of the defendant to overcome the inference of being the robber from possession of recently stolen (sic) bait money.

The trial court's evaluation of his charge was stated:

> "The Court: I think they've gotten the idea that if he was found with the bail money and wasn't satisfactorily explained, he would be charged with the taking, whether it was by larceny or robbery." (534-535).

There was no way that the defense theory and evidence could get to the jury through the trial court's charges.

The charges not only placed the burden on the defendant to prove his innocence - that the bait money was not stolen

and that he was not the robber, but precluded any defense on those two issues.

The error of the charge was compounded by repetition:

At page 510:

> "When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence and explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent, fabricate an explanation or statement tending to establish his innocence whether or not the evidence as to defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence, are matters exclusively within the province of the jury: The jury will also bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or making any explanation." (511)

The trial court itself stated that its charge was "a little confusing" (524-525). The trial court thereupon proceeded to state the charge again and in doing so re-empahsized to the jury that the jury was being instructed that the government could satisfy its burden of proof by the "inference from recently stolen bait money" (524-525); the trial court equated and identified the "bait money" as "stolen":

At page 524-526:

> "Now, I am afraid what I just said was a little confusing, and I'd like to restate it.
>
> If the Government has proved that the bait money was stolen during the robbery, then you may, in the light of that inference and all the other

> evidence in the case, find that the defendant was the robber. The Government does not have to prove by separate independent evidence, aside from the benefit of that inference, that he was the robber. That inference from recently stolen bait money, would support the elements of the crime charged, except the one element that you find only in count 1, to wit, that defendant placed in deopardy the lives of employees or other persons.
>
> THE COURT: (continuing) Now, in considering whether the defendant's possession of the 25/$20 pre-recorded bills has been satisfactorily explained, take into consideration all the testimony, including the defendant's explanation as to how he came into possession of the money.
>
> Now, whether the money is recently stolen, and what weight to be given the inference is solely within your discretion. I just suggest to you that the longer the period of time from the date of the robbery to the date of possession, the weaker the inference. The shorter the period of time, the stronger the inference.
>
> Again, that, too, is pure common sense." (Underscoring added)

The trial court prevented the jury from focusing on the defense by its refusal to refer in its charge to the contention of the defendant that he received the bait money on February 25, 1974 (572). The charge simply directed a verdict of guilty against the defendant as to count 2.

The jury showed that it was both confused by the charge and understood that it was bound by the charge to render a particular verdict, and made the following request to the trial court (559):

> "We cannot reach a decision tonight. Can you charge -- instruct us again tomorrow on how to reach a verdict or what we must base our verdict on and find out if everyone understands." (558-559)

As a result of that request, the trial court repeated the inference charge which again identified and held that "bait money" "recently stolen" with the result that the defendant was deprived of due process and of a fair trial:

> At pp. 573-576:
>
> "The defendant concedes that on February 25th, 1974, an individual entered the bank and took and carried away approximately $4,066 in currency -- now, at this point I will say that that concession does not include that the bait money was part of the $4,066. The concession is only that $4,066 was taken and carried away -- which said currency was in the care, custody, control, management and possession of the said bank, and that said taking and carrying away was with intent to steal or purloin.
>
> In effect, what the defendant is conceding is that some individual committed a crime set forth in the third count of the indictment -- the lesser of the three counts -- without conceding that the bait money was part of that $4,066.
>
> Now, do I express the concession correctly?
>
> MR. LEVINE: Correct.
>
> THE COURT: From there if the government proves beyond a reasonable doubt that the 24/ $20 prerecorded bills -- that is the bait money -- was taken from the bank on that day as part of the proceeds of the theft, then the only issue for you to decide as to the last count -- count three, whether the defendant was the thief and as to the other two whether he was the robber. That is one and the same because the first two counts describes in technical language a robbery and the third is a theft, because robbery includes force, violence and intimidation. If you notice larceny does not. For this narrow issue, they are identical.
>
> The defendant concedes that he was in exclusive possession of the bait money on March 4, 1974.

> you are not required to draw any conclusions from that circumstance -- from the circumstance of the possession of the bait money -- but you are permitted to infer from the defendant's unexplained or unsatisfactorily explained possession or false explanation of possession of the bait money, and in light of the surrounding circumstances as shown by the evidence, that the defendant was the thief and/or robber. (Underscoring added)
>
> In determining the strength of the inference that you may make, take into consideration the time lapse between the robbery and defendant's possession of the bait money. Obviously, if he had come into possession of the money on the day of the robbery, the inference would be stronger than if he would have come into possession of the money one month after the robbery. Neither of these events happened, but I use that as an example to show you the strength of the inference depends -- when we talk about recent possession -- depends on the time lapse and all the other surrounding circumstances. In determining when he came into possession of the money, take into consideration all the testimony in the entire case, and in considering the inferences, take all the testimony of all the witnesses into consideration.
>
> If you find the Government proved beyond a reasonable doubt that the defendant was the robber and/or the thief, then you must return to the charges in the indictment in the order in which I charged you, considering first the graver offense to determine whether the government has proved the other essential elements of the crimes charged..."

The trial court charged that while the jury was not "required to draw any conclusions" from the circumstance that "the defendant concedes that he was in exclusive possession of the bait money on March 4, 1974", "you are permitted to infer from the defendant's unexplained or unsatisfactorily explained possession or false possession of the bait money,

and in the light of the surrounding circumstances as shown by the evidence, that the defendant was the thief and/or robber" (574).

That charge effectively directed a verdict against the defendant. The trial court was stating to the jury that the "surrounding circumstances as shown by the evidence" coupled with the defendant's possession of the bait money allowed the jury to conclude that the defendant was the "thief and/or robber."

POINT II

The trial court committed reversible error in the admission of testimony.

An essential issue of fact in this case was whether the bail money was in Angela Crimi's cash drawer at 2 p.m. on February 25, 1974 when the bank robbery occurred.

Angela Crimi testified that she was on the floor when the bank robber left and when the police arrived ( ). She testified that the police then ordered her out of the bank, that she went next door for about five minutes with "Deborah Brown", myself, Denise and Richard Cocciardo, that she came back to the bank on orders of a police officer about five minutes later (33/12-25, 34/1-3) that thereafter she checked her cash drawer to find out how much was taken (34/20-25, 35/1-5), which was

$4,066 /which defendant then stipulated (35/6-12), without any stipulation as to denominations taken/, which was only from Angela Crimi's station (36/10-15). Thereafter, she was asked questions by the government whether she knew the denominations of bills that she had in her cash drawer on February 25, 1974 (39/4-7) and she answered

> "A. I had in my drawer at that time some 50's, some 100's, 20's, 10's, 5's and some singles." (39/9-10),

she was asked the following question and she gave the following answer, to which the defendant's attorney duly objected, and which was overruled (39/11-17):

> "Q. Do you know, roughly, how much of each you had?
>
> A. Well, I know I had at least 500 in 20's. I had more -- I don't know what. The 500 I can definitely say I had, because it is my bait money.
>
> Mr. Levine: Objection
>
> The Court: Overruled. I'll allow it." (39/11-17).

The answer of Angela Crimi was not responsive to the question, was conclusory and was hearsay. Her testimony that the bait money was in her drawer on February 25, 1974 at the time of the bank robbery was a vital material fact issue in the case.

It was reversible error to have admitted that testimony to that question.

> Bridges v. Wixon,
> 326 U.S. 135 (1945).

Angela Crimi gave no testimony whatever that she had seen the bait money, or counted it, or checked, or did anything with it after December 19, 1973. (45) Her testimony here that she had 500 20's "because it is my bait money" was just speculation, a bare conclusion not based on observation and hearsay. It was not a statement of objective fact arising from observation, but a statement arising from prejudice or speculation.

The prejudice to the defendant's right to a fair trial from this testimony was the more pronounced because Angela Crimi testified on direct that on February 25, 1974 she "gave it" out as distinct from it's being "stolen": to wit:

"The Court:...when did you first come into possession of the 25 pre-recorded $20 bills?

The Witness: On April 19, 1973.

Q. Is that when you took control of that particular position?

A. right.

The Court: Since that time that packet remained in your drawer?

The Witness: Right.

The Court: Never touched until you say...

The Witness: What do you mean 'never touched', I don't understand.

The Court: Never given out?

The Witness: Right

The Court: Until when?

The Witness: Feburary 25th." (40/14-25, 41/2-6).

This testimony which supports the testimony of the defendant that he received the bait money on February 25, 1974 in a regular bank transaction - cash exchange for two checks - shows that the charges of the trial court on the inference to be drawn by the jury from the bare possession by the defendant of the bait money precluded consideration by the jury of the defense.

Angela Crimi testified on direct that the bait money was usually kept underneath the 20's with a $500 strap around it. There was no testimony to show whether the other 20's in Crimi's drawer were loose or had any straps of any denomination on them. (40)

Angela Crimi testified that she did not handle the money from her drawer when the robbery took place (47/14-25, 48/2-5) and that she did see any money taken from her drawer by the bank robber (48/2-5). The testimony of Angela Crimi on direct shows that she was still lying on the floor when the robber left and when the police arrived (32/15-24, 33/2-9) at which time the police arrived (33/10-11) and told her and others "to get out of the bank" (33/10-11) which she did (33/12-20). She testified she stayed out of the bank "Iwould say five minutes and then we were told to come back into the bank by one of the police officers" (33/18-24).

Thus, Angela Crimi did not look into or check her drawer until at least five minutes after she had left the bank following the bank robbery - five minutes in which others were

in the bank as to which Crimi - and no other witness - had any knowledge of what occurred.

It is important again to note that Angela Crimi did not testify at any time that she had actual knowledge that the bait money was in her drawer at or about 2 p.m. when the bank robbery occurred. The government failed to prove that issue at all by any legal evidence.

POINT III

The coat was the product of a warrantless, unconsented to search and seizure and should have been suppressed.

The government introduced a coat belonging to defendant (G X12) which was seized without a warrant and without the consent of the defendant or of his fiancee, Carol M. Klein, in the garage where defendant parked his car and used. (150,139-140)

The government failed to establish its argued claim of consent to search by any evidence of consent to the search by Mrs. Klein. (150,139-140)

All that appears in the record is that the police and the F.B.I. went into the garage in the company of Mrs. Klein. (150) That is not sufficient to establish a consent to search.

Further, since the coat was not contraband, as such, it could not be seized by the police and agents without a search warrant showing probable cause that the coat was evidence of a crime.

Coolidge v. New Hampshire,
403 U.S. 443 (1971).

POINT IV

The gloves and scarf were the product of an unauthorized search and seizure

The gloves and scarf belonging to the defendant were seized by police and F.B.I. agents acting under the purported authority of a search warrant dated March 6, 1974.

The gloves were not mentioned or described in the search warrant.

The scarf seized was not described in the search warrant. The search warrant described a "green plaid scarf". The scarf seized was a multi-colored mottled camouflage design scarf.

The search warrant can not give police authority to conduct a general search for evidence. It must describe the place to be searched and the things to be seized. The search warrant did not do so.

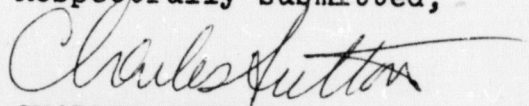
Further, the search warrant authorized only a search of premises 9 John Street, Shoream, New York 'occupied by Carolyn Klein'. The evidence establishes that the area from which the gloves and scarf were seized were the locked and private area of 9 John Street, Shoream, occupied solely by the defendant to the exclusion of all others (151, 152).

The defendant was not named in the warrant.

CONCLUSION

The judgment should be reversed and the motion to suppress should be granted.

Respectfully submitted,



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Dated: December 26, 1974

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(2 copies rec'd)